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and Michael S. McKinney a/k/a Mike McKinney*

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

PERFORMANCE RHINO, LLC,

Plaintiff,

v.

THE GUN GARAGE, INC., a Georgia
corporation; MICHAEL S. MCKINNEY
a/k/a MIKE MCKINNEY,

Defendants.

CASE NO: 2:13-cv-01291-JCM-GWF

State Court Case No.: A-13-684454-C
Dept. No.: 31

**DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE**

Pursuant to Rule 201 of the Federal Rules of Evidence, Defendants, THE GUN GARAGE, INC. ("The Gun Garage") and MICHAEL S. MCKINNEY ("Michael McKinney," and collectively with The Gun Garage, "Defendants"), by and through their undersigned Counsel, hereby request that the Court take judicial notice of the following documents and facts

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referenced below, which are submitted as part of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2), or Alternatively Fed. R. Civ. P. 12(b)(6) ("Motion to Dismiss"), Dkt #20, filed concurrently herewith:

Ex. A The United States Patent and Trademark Office's ("PTO") online record, available at <uspto.gov>, concerning The Gun Garage's federally registered service mark THE GUN GARAGE, INC., U.S. Registration No. 3,646,936 (the "GUN GARAGE® trademark"), as referenced in the Complaint¹ at ¶ 15;

Ex. B PTO's online record, available at <uspto.gov>, concerning Plaintiff Performance Rhino, LLC's ("Performance Rhino") trademark application for the word mark GUNS & AMMO GARAGE (the "GUNS & AMMO GARAGE applied-for mark");

Ex. C PTO's online record, available at <uspto.gov>, concerning an Office Action dated April 5, 2012 ("First Office Action") regarding Performance Rhino's GUNS & AMMO GARAGE applied-for mark;

Ex. D PTO's online record, available at <uspto.gov>, concerning an Office Action dated June 21, 2012 ("Second Office Action") regarding Performance Rhino's GUNS & AMMO GARAGE applied-for mark;

Ex. E PTO's online record, available at <uspto.gov>, concerning the abandonment of Performance Rhino's GUNS & AMMO GARAGE applied-for mark on December 24, 2012;

Ex. F Letter dated February 11, 2013 from counsel for The Gun Garage to Performance Rhino as referenced in the Complaint at ¶¶ 15-16;

Ex. G PTO's online record, available at <uspto.gov>, concerning a Notice of Abandonment dated February 13, 2013 regarding Performance Rhino's GUNS & AMMO GARAGE applied-for mark; and

Ex. H Letter dated June 13, 2013 from counsel for Performance Rhino to counsel for The Gun Garage as referenced in the Complaint at ¶ 16.

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¹ All references to the "Complaint" relate to the Complaint of Performance Rhino dated June 28, 2013, annexed as Exhibit A to Defendants' Notice of Removal. See Docket #1.

ARGUMENT

Pursuant to Rule 201, a court may take judicial notice of facts that are “capable of accurate and ready determination by resort to resources whose accuracy cannot be reasonably questioned.” Fed. R. Evid. 201(b)(2). As such, the Court may take judicial notice of documents attached to the Complaint, documents incorporated by reference in the complaint, or undisputed matters of public record, without converting the motion to dismiss to one for summary judgment. See Harris v. County of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012); United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003); see also Mack v. South Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

Courts routinely take judicial notice of records from the United States Patent and Trademark Office (“PTO”). See e.g., Email Link Corp. v. Treasure Island, LLC, et. al, Case No. 2:11-cv-01433-ECR-GWF (D. Nev., Sept. 25, 2012); Barron v. Reich, 13 F. 3d 1370, 1377 (9th Cir. 1994) (judicial notice may be taken of “[r]ecords and reports of administrative bodies”); Interstate Natural Gas Co. v. Southern California Gas Co., 209 F. 2d 380, 385 (9th Cir. 1953) (“We may take judicial notice of records and reports of administrative bodies.”). Because the status of the GUN GARAGE® trademark and the history of the GUNS & AMMO GARAGE applied-for mark are officially published on the PTO website, <uspto.gov>, they are ascertainable, verifiable, and their accuracy cannot be reasonably questioned. Furthermore, Performance Rhino references the GUN GARAGE® trademark and the GUNS & AMMO GARAGE applied-for mark throughout its Complaint. See Complaint at ¶¶ 15-16, 37, 44, 51. As such, Defendants request that the Court take judicial notice of exhibits A, B, C, D, E, and G annexed to their Motion to Dismiss.

In the context of a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, “[a] court may also treat certain documents as incorporated by reference into the plaintiff’s complaint if the complaint ‘refers extensively to the document or the document forms the basis of the plaintiff’s claim.’” Email Link Corp. v. Treasure Island, LLC, et. al, Case No. 2:11-cv-01433-ECR-GWF (D. Nev., Sept. 25, 2012) (quoting Ritchie, 342 F. 3d at 908).

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Judicial notice of the letter dated February 11, 2013 from counsel for The Gun Garage to Performance Rhino (Exhibit F) and the letter dated June 13, 2013 from Performance Rhino to counsel for The Gun Garage (Exhibit H), because the Complaint refers to these documents extensively. See Complaint ¶¶ 15-16. Thus, Defendants request that the Court take judicial notice of Exhibits F and H annexed to their Motion to Dismiss.

CONCLUSION

Pursuant to the foregoing, Defendants respectfully request that the Court take judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence of the documents referenced herein and annexed as exhibits to their Motion to Dismiss.

DATED this 5th day of August 2013,

Respectfully Submitted:
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